Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

TAIWAN, et al.,

Petitioners,

vs.

TEI YAN SUN and YEH HWA SUN, individually and as Personal Representatives of PETER SUN, Deceased, and PHILIPE SUN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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August, 2000

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QUESTIONS PRESENTED

1. Under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(2), what legal analysis should be followed by state and federal courts to determine whether a claim is "based upon" commercial activity in light of this Court's ruling in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993)?

2. Did the Ninth Circuit fail to follow *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) by allowing a negligent failure to warn claim to form the basis for jurisdiction over Taiwan?

3. Is Taiwan's state-sponsored and subsidized training program for overseas young people of Chinese descent a "peculiarly sovereign" activity under *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993)?

LIST OF PARTIES

Taiwan (also known for purposes of this proceeding as "Governmental Authorities on Taiwan" and "Republic of China"), Taipei Economic and Cultural Representative Office in the U.S. (formerly known as the "Coordination Council for Northern American Affairs") ("TECRO"), and Overseas Chinese Affairs Commission ("OCAC"). Collectively, these parties shall be referred to as "Taiwan" or "Petitioners." TECRO is a non-profit governmental corporation created under the laws of Taiwan. It has no parent company, affiliates or subsidiaries that have issued shares to the public. Sup. Ct. R. 29.6.

Respondents are as listed in the caption and shall be referred to as "Suns" or "Plaintiffs."

Defendant Chinese Youth Corps has been dismissed from this case. Otherwise, the list of parties before this Court are identical to those in the proceedings below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

INDEX TO APPENDICES iv

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

THE FEDERAL STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 7

I. THIS COURT'S TEST FOR JURISDICTION OVER FOREIGN SOVEREIGNS – WHETHER ELEMENTS OF THE CLAIM OCCUR IN THE UNITED STATES (*SAUDI ARABIA v. NELSON*, 507 U.S. 349, 356 (1993)) – HAS LED TO WIDELY DIFFERING APPLICATIONS AMONG THE CIRCUITS, SUGGESTING THE NEED FOR CLARIFICATION 7

II. *SUN v. TAIWAN* DIRECTLY CONFLICTS WITH *SAUDI ARABIA v. NELSON*, 507 U.S. 349 (1993) 16

A. The Ninth Circuit Found That Jurisdiction May Be Asserted Over Taiwan For "Failing To Disclose" Information, But *Nelson* Precludes Claims Based Upon Negligent Failure To Warn 16

B. Taiwan's Overseas Training Program Is "Peculiarly Sovereign," As The Police Activity In *Nelson* Was Peculiarly Sovereign 18

CONCLUSION 19

INDEX TO APPENDICES

Appendix A Opinion of the United States Court of Appeals for the Ninth Circuit (affirming in part, reversing in part and remanding; February 3, 2000) ..... App. 1-16

Appendix B First Order of the United States District Court for the Northern District of California (granting defendants' motion to dismiss for lack of jurisdiction with leave to amend; October 4, 1995) ..... App. 17-27

Appendix C Second Order of the United States District Court for the Northern District of California (granting defendants' motion to dismiss for lack of jurisdiction; October 15, 1998)... App. 28-52

Appendix D Order of the United States Court of Appeals for the Ninth Circuit (denying the petition for rehearing and rehearing *en banc*; June 2, 2000) ..... App. 53-54

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adler v. Federal Republic of Nig.
107 F.3d 720 (9th Cir. 1997) 14

Atkinson v. The Inter-American Development Bank
156 F.3d 1335 (D.C. Cir. 1998) 12

Callejo v. Bancomer, S.A.
764 F.2d 1101 (5th Cir. 1985) 7, 8

Compania Gen. de Tabacos de Filipinas v. Collector of I.R.S.
275 U.S. 87 (1927) 14

Davies v. Republic of Marshall Islands
174 F.3d 969 (9th Cir. 1999) 9, 10, 11

Federal Ins. Co. v. Halprin Supply Co.
12 F.3d 1270 (3d Cir. 1993), *cert. denied*, 511 U.S. 1107 (1994) 10

Filetech S.A. v. France Telecom S.A.
157 F.3d 922 (2d Cir. 1998) 11

First Fidelity Bank, N.A. v. Government of Antigua & Barbuda – Permanent Mission
877 F.2d 189 (2d Cir. 1989) 14

First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba
462 U.S. 611 (1983) 7

Foremost-McKesson, Inc. v. Islamic Republic of Iran
905 F.2d 438 (2d. Cir. 1990), *cert. denied*, 516 U.S. 1045 (1996) 15

Gates v. Victor Fine Foods
54 F.3d 1457 (9th Cir. 1995), *cert. denied*, 516 U.S. 869 (1995) 11, 15

TABLE OF AUTHORITIES – Continued

Page

General Elec. Capital Corp. v. Grossman
991 F.2d 1376 (8th Cir. 1993) 11

Gibbons v. Udaras na Gaeltachta
549 F.Supp. 1094 (S.D.N.Y. 1982) 7

In re Papandreou
139 F.3d 247 (D.C. Cir. 1998) 9

In re Tamimi
176 F.3d 274 (4th Cir. 1999) 11

International Hous. v. Rafidain Bank Iraq
893 F.2d 8 (2d Cir. 1989) 13

International Shoe Co. v. Washington
326 U.S. 310 (1945) 9

Kelly v. Syria Shell Petroleum Dev. B.V.
213 F.3d 841 (5th Cir. 2000) 8, 9, 19

Liu v. Republic of China
892 F.2d 1419 (9th Cir. 1989), *cert. dismissed*, 497 U.S. 1058 (1990) 15

NYSA-ILA Pension Trust Fund v. Garuda Indonesia
7 F.3d 35 (2d Cir. 1993), *cert. denied*, 510 U.S. 1116 (1994) 11

Saudi Arabia v. Nelson
507 U.S. 349 (1993) ..... *passim*

Sugimoto v. Exportadora de Sal, S.A. de C.V.
19 F.3d 1309 (9th Cir. 1994), *cert. denied*, 513 U.S. 1018 (1994) 11

Sun v. Taiwan
201 F.3d 1105 (9th Cir. 2000) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Texas Trading & Milling Corp. v. Federal Republic of Nig.
647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) 8

The Eagle
75 U.S. 15 (1868) 14

The Export Group v. Reef Industries, Inc.
54 F.3d 1466 (9th Cir. 1995), *cert. denied*, 525 U.S. 1141 (1999) 15

Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp.
204 F.3d 384 (2d Cir. 2000) 7, 10, 11, 13

United States ex rel. Mistick PBT v. Housing Auth.
186 F.3d 376 (2d Cir. 2000), *cert. denied*, 120 S. Ct. 1418, 2000 U.S. LEXIS 1909 (2000) 10

Voest-Alpine Trading U.S.A. Corp. v. Bank of China
142 F.3d 887 (5th Cir. 1998), *cert. denied*, 525 U.S. 1041 (1998) 11, 12, 14

STATE CASES

McCollum v. Friendly Hills Travel Ctr.
172 Cal. App. 3d 83 (1985) 17, 18

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1603(e) 10

28 U.S.C. § 1605(a)(2) ..... *passim*

Foreign Sovereign Immunities Act
28 U.S.C. §§ 1330, 1602, *et seq.* ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

RULES

Sup. Ct. R. 13.3 2

Sup. Ct. R. 29.6 ii

OTHER AUTHORITIES

H.R. Rep. No. 94-1487, p. 32 (1976) 7

BLACK'S LAW DICTIONARY 151 (6th ed. 1990) 8

RANDOM HOUSE DICTIONARY 172 (2d ed. 1987) 8

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 180, 181 (1976) 8

PETITION FOR WRIT OF CERTIORARI

Petitioners Taiwan (also known for purposes of this proceeding as "Governmental Authorities on Taiwan" and "Republic of China"), Taipei Economic and Cultural Representative Office in the U.S. (formerly known as the "Coordination Council for Northern American Affairs"), and Overseas Chinese Affairs Commission respectfully pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The ruling on appeal by the United States Court of Appeals for the Ninth Circuit reversing and remanding the case is reproduced as Appendix A and reported at 201 F.3d 1105 (9th Cir. 2000). The first order of the United States District Court for the Northern District of California granting Taiwan's motion to dismiss with leave to amend on the ground that it is protected from suit under the Foreign Sovereign Immunities Act ("FSIA") is found at Appendix B. The second order from the District Court granting Taiwan's motion to dismiss on the ground that it is protected from suit under the FSIA is attached hereto as Exhibit C. The Ninth Circuit's ruling on Taiwan's petition for panel rehearing and for rehearing *en banc*, with one justice recommending rehearing *en banc*, is reproduced as Appendix D.

JURISDICTION

The jurisdiction of the District Court was invoked under 28 U.S.C. § 1330. It is undisputed that all of the defendants are foreign sovereigns or instrumentalities thereof. Accordingly, the FSIA provides the only basis for jurisdiction against the defendants. This Court furthermore has jurisdiction under 28 U.S.C. § 1254(1). The United States Court of Appeals for the Ninth Circuit decided this case on February 3, 2000 and denied Taiwan's timely petition for rehearing on June 2, 2000. This petition, therefore, is timely under Rule 13.3 of this Court.

THE FEDERAL STATUTE INVOLVED

The Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .
>
> (2) in which the action is based upon commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

STATEMENT OF THE CASE

It is undisputed that the named defendants are foreign sovereigns. Specifically, Taiwan's Executive Yuan (or cabinet) established a separate ministry called the Overseas Chinese Affairs Commission ("OCAC") especially to foster closer ties between Taiwan and people of Chinese descent living in other countries around the world. As part of that sovereign political mission, OCAC implemented the "Overseas Chinese Youth Language Training & Study Tour to the Republic of China" ("Overseas Training" or "Training"). [ER 52]. Under the program, young Chinese adults come to Taiwan where OCAC arranges a six week curriculum for them to learn Mandarin, Chinese history, culture, society, economics, politics and diplomacy. OCAC also arranges opportunities for them to see firsthand the achievements of the Republic of China in Taiwan. [ER 52]. The Overseas Training, which is available only to people of Chinese descent, is heavily subsidized by the Taiwanese government (participants pay only $400 for the six weeks) and includes excursions to purely governmental establishments, such as military bases, that are not open to the general public or to tourists; it also offers credits from the National Taiwan Normal University, Taiwan's leading public university.

Taiwan advertised the Overseas Training in a Chinese-American newsletter in the United States. The advertisement did not contain an itinerary. [ER 160]. The Suns, who live in Illinois, responded to the newsletter by obtaining an application for the Overseas Training from the Chicago office of the Coordination Council for Northern American Affairs ("CCNAA"). [ER 153]. The Suns then submitted, on behalf of their 22 year old son Peter,

an application to the San Francisco office of CCNAA, which was then forwarded to Taiwan for approval.

OCAC, which is located in Taiwan, accepted Peter Sun's application to participate in the 1993 Overseas Training. [ER 57]. OCAC prepared a brochure in Taiwan regarding the training, which was then sent by the Republic of China's various consular offices to training participants throughout the world. [ER 56; 64-96]. The brochure that was sent to Peter Sun after he had signed up for the tour included Ken Ting Beach in its itinerary and stated, in English, "No one should leave the group and go swimming without permission from the staff." [ER 68]. Notwithstanding that warning and posted warnings at Ken Ting Beach in Mandarin and English, Peter Sun plunged into the waves and drowned. [ER 190].

Jurisdictionally, it is important to note that the Overseas Training was designed and planned in Taiwan. All of the participants, including Mr. Sun, were required to make their own travel arrangements to get to Taiwan, and the Training did not begin until Mr. Sun arrived in Taiwan. It is also important to note that no contracts were negotiated or made in the United States; any contract was made in Taiwan upon Mr. Sun's arrival and registration for the Training. The District Court found (and the Ninth Circuit did not disagree) that all of these activities occurred in Taiwan. App. C, pp. 38-40; App. A, pp. 14-15; *Sun v. Taiwan*, 201 F.3d 1105, 1110 (9th Cir. 2000).

The surviving relatives of Peter Sun sued Taiwan in the United States District Court for the Northern District of California. They alleged one cause of action for negligence and asserted that jurisdiction was proper under 28

U.S.C. § 1605(a)(2). Taiwan moved to dismiss on the ground that the claim was not based upon commercial activity carried on in the United States. The District Court granted the motion, but allowed Plaintiffs to amend their complaint and conduct further discovery. App. B, p. 17. Upon completion of the discovery, Taiwan brought another motion to dismiss which the District Court granted, holding that "[A]ll of the actions of the defendants on which plaintiffs' cause of action is based took place in Taiwan." App. C, p. 38. Plaintiffs appealed.

The Ninth Circuit agreed with the District Court, stating that "the district court correctly concluded that the Suns' action was not based on Taiwan's activity in the United States." App. A, p. 14; *Sun*, 201 F.3d at 1110. The Ninth Circuit nevertheless remanded the case because Plaintiffs "changed their theory of the case" on appeal. App. A, p.15; *Sun*, 201 F.3d at 1110. The Ninth Circuit described Plaintiffs' new theory as follows:

> [T]he Suns argue that, like other tour organizers, Taiwan was under an affirmative duty to exercise reasonable care by disclosing known information concerning prospective dangers and by not misleading prospective participants. Moreover, the Suns allege that Taiwan's requirement, made known to the Suns in the United States, that their son participate in the beach trip without disclosing the dangers constitutes the basis for their action for negligent misrepresentation.

Id. (footnote omitted).

In opposition, Taiwan argued that Plaintiffs could not properly raise a new theory on appeal, absent some extenuating circumstance. Taiwan further argued that,

even under this new theory, the action is specifically barred by *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), which expressly holds that claims against foreign sovereigns based upon a negligent failure to warn cannot be maintained. In its petition for panel rehearing or for rehearing *en banc*, Taiwan argued that the Ninth Circuit incorrectly drew a distinction between a failure to "disclos[e] known information concerning prospective dangers" (App. A. p. 15; *Sun*, 201 F.3d at 1110), and a "failure to warn . . . of otherwise undisclosed dangers." *Nelson*, 507 U.S. at 354. One of the three Circuit judges voted for rehearing *en banc*.

Taiwan files this Petition at this time because, if it does not seek Supreme Court review, the Ninth Circuit's interpretation of *Nelson* will become binding below. In the alternative, Taiwan seeks summary reversal of the Ninth Circuit's opinion because it directly conflicts with Supreme Court precedent, not only in its interpretation of *Nelson*, but by allowing a failure to warn cause of action to be pled in an FSIA case.

REASONS FOR GRANTING THE PETITION

I. THIS COURT'S TEST FOR JURISDICTION OVER FOREIGN SOVEREIGNS – WHETHER ELEMENTS OF THE CLAIM OCCUR IN THE UNITED STATES (*SAUDI ARABIA v. NELSON*, 507 U.S. 349, 356 (1993)) – HAS LED TO WIDELY DIFFERING APPLICATIONS OF THE FSIA AMONG THE CIRCUITS, SUGGESTING THE NEED FOR CLARIFICATION.

As this case demonstrates, the circuit and district courts need significantly more guidance on the difficult and important question of when they may assert jurisdiction over foreign sovereigns. "In suits against foreign sovereigns, it is well settled that the FSIA provides the only basis for the subject-matter jurisdiction of U.S. courts." *Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384, 388 (2d Cir. 2000) (citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 355). "When it enacted the FSIA, Congress expressly acknowledged 'the importance of developing a uniform body of law' concerning the amenability of a foreign sovereign to suit in United States courts." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 (1983) (citing H.R. Rep. No. 94-1487, p. 32 (1976) (determining choice of law)).

Unfortunately, however, a uniform body of law has not developed under the FSIA. The FSIA has been called a "remarkably obtuse" document and a "constant bane of the federal judiciary." *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1107 (5th Cir. 1985) (citing *Gibbons v. Udaras na Gaeltachta*, 549 F.Supp. 1094, 1105-06 (S.D.N.Y. 1982)). Congress did not provide explicit instructions for determining when U.S. and state courts may assert jurisdiction

over foreign sovereigns, but "put its faith in the courts to develop guidelines on a case-by-case basis." *Id.* (citing *Texas Trading & Milling Corp. v. Federal Republic of Nig.*, 647 F.2d 300, 308-09 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982)).

To date, the courts have not developed meaningful guidelines which may be applied uniformly and with predictability in this sensitive area of law that affects our international statecraft as well as our own national jurisprudence. Section 1605(a)(2) of the FSIA provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is *based upon*" any of those jurisdictionally significant acts. A satisfying definition of this "based upon" language seems particularly elusive. In a sharply divided opinion, now seven years old, this Court sought to define those words. According to *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), "the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357 (citing BLACK'S LAW DICTIONARY 151 (6th ed. 1990); RANDOM HOUSE DICTIONARY 172 (2d ed. 1987); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 180, 181 (1976)).

This seemingly straightforward test has been applied inconsistently in a variety of ways, leading to conflicting results. For example, this case, *Sun v. Taiwan*, 201 F.3d 1105 (9th Cir. 2000) (App. A, pp. 1-16), was decided two days after *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841 (5th Cir. 2000). The Ninth Circuit found that if Taiwan owed a duty to Plaintiffs in the United States, then jurisdiction under the FSIA may lie. *Sun*, 201 F.3d at 1110. The

Fifth Circuit rejected the argument that a duty may form the basis for jurisdiction against a foreign sovereign. *Kelly*, 213 F.3d at 853. Both the Fifth Circuit and the Ninth Circuit cited *Nelson*, but they reached opposite conclusions.[1] It seems clear that had the *Sun* plaintiffs sued Taiwan in the Fifth Circuit rather than the Ninth Circuit, the Fifth Circuit would have found no basis for jurisdiction.

This apparent conflict between *Sun* and *Kelly* is representative of a widespread lack of uniformity among the circuit courts. The Ninth Circuit apparently interprets the FSIA as nothing more than a long-arm statute, restricted only by the "minimum contacts" analysis of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In *Davies v. Republic of Marshall Islands*, 174 F.3d 969 (9th Cir. 1999), the Ninth Circuit agreed with Justice Stevens's dissenting opinion in *Nelson* that the first clause of § 1605(a)(2) "authorizes 'general' jurisdiction over foreign entities that engage in substantial commercial activity in this country." *Id.* at 975-76 (citing *Nelson*, 507 U.S. at 379 and n.3 (Stevens, J., dissenting)). This test seems to undermine the "based upon" language in its entirety. *Cf. In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998) ("We have never decided precisely what 'substantial contact' amounts to

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[1] In *Kelly*, the sovereign defendant's commercial activities in the U.S. consisted of the recruitment, through U.S. agents, of workers to extinguish oil well fires abroad. Plaintiffs alleged that their negligence claims were based upon the sovereign defendant's commercial activities in the U.S., under the first clause of 28 U.S.C. § 1605(a)(2). On August 29, 2000, the plaintiffs in *Kelly* filed their own petition for writ of certiorari raising *verbatim* the first issue raised by this petition.

in the FSIA context, though we have said that it requires more than the minimum contacts sufficient to satisfy due process in establishing personal jurisdiction . . . . ").

The *Nelson* Court specifically did not determine what it means for a foreign sovereign to have "substantial contact" with the United States. 28 U.S.C. § 1603(e). "Because we conclude that the suit is not based upon any commercial activity by petitioners, we need not reach the issue of substantial contact with the United States." *Nelson*, 507 U.S. at 356. This Court could reach that issue in this case thereby providing guidance to the lower courts.

More importantly, this Court could answer the question courts are still posing even after *Nelson*: "What does 'based upon' mean?"[2] *Transatlantic*, 204 F.3d at 388 (2d Cir. 2000). *Nelson* apparently left that question unresolved for the lower courts.

While no court has expressly repudiated *Nelson* (*but see Davies*, 174 F.3d at 975 (citing with approval the opinion of Stevens, J., dissenting)), its "elements of the cause of action" test has been applied in a haphazard fashion. Many of the lower courts cite *Nelson*, but then do not systematically apply the test. *See, e.g., Federal Ins. Co. v. Halprin Supply Co.*, 12 F.3d 1270 (3d Cir. 1993), *cert. denied*, 511 U.S. 1107 (1994) (citing *Nelson* without specifically

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[2] The terms "based upon" have led to conflicts in other contexts. *See, e.g., United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376, 394 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 1418 (2000) (Becker, C.J., dissenting) ("Courts have differed on the proper interpretation of this [based upon] phrase" – qui tam action.).

analyzing where elements of cause of action occurred); *In re Tamimi*, 176 F.3d 274, 280 (4th Cir. 1999) (citing *Nelson*, failing to apply elements test in garnishment action); *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1382 (8th Cir. 1993) (citing *Nelson*, but failing to determine where elements may have occurred). Other courts struggle to apply the test, then dispose of the case on other grounds. *See, e.g., Transatlantic*, 204 F.3d at 388 (noting that a literal interpretation of *Nelson* would preclude enforcement of judgments against foreign sovereigns, but not deciding this "sensitive" question).

Still other courts do not refer to the test at all. *See, e.g., Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 930 (2d Cir. 1998) (citing *Nelson* for proposition that there must be a significant nexus between the commercial activity and the plaintiffs' cause of action, but not mentioning the "elements" test); *NYSA-ILA Pension Trust Fund v. Garuda Indonesia*, 7 F.3d 35, 38 (2d Cir. 1993), *cert. denied*, 510 U.S. 1116 (1994) (citing *Nelson*, but not mentioning elements of cause of action or applying test); *Davies*, 174 F.3d at 975 (citing only Justice Stevens's dissenting opinion, not applying test); *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1463 (9th Cir. 1995), *cert. denied*, 516 U.S. 869 (1995) (citing *Nelson*, but not mentioning elements test).[3]

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[3] Only three circuit court decisions seem to apply the test in a systematic way. *See Voest-Alpine Trading U.S.A. Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998), *cert. denied*, 525 U.S. 1041 (1998) (failure to pay on letter of credit); *Sugimoto v. Exportadora de Sal, S.A. de C.V.*, 19 F.3d 1309, 1311 (9th Cir. 1994), *cert. denied*, 513 U.S. 1018 (1994) ("[A]n element of the plaintiffs' claim consists in the tortious flying of the plane in United States air

Several of these cases refer to the second or third clause of 28 U.S.C. § 1605(a)(2), neither of which is at issue here because Plaintiffs assert jurisdiction under the first clause only. Nonetheless, "[a]ll three clauses require that the cause of action be 'based upon' a certain act or activity of the foreign state, that is, the act or activity must form the basis of at least some element of the cause of action." *Voest-Alpine Trading U.S.A. Corp. v. Bank of China*, 142 F.3d 887, 892 (5th Cir. 1998), *cert. denied*, 525 U.S. 1041 (1998) (citing *Nelson*, 507 U.S. at 357). The primary issue raised by this petition, therefore, is what does "based upon" mean in 28 U.S.C. § 1605(a)(2) and precisely what analysis should courts employ to determine whether a claim against a foreign sovereign is "based upon" a jurisdictionally significant act.

Petitioners respectfully suggest that even in *Nelson* itself, the Court did not consistently apply the "elements of the cause of action" test. After announcing the elements test in the beginning portion of the opinion (*Nelson*, 507 U.S. at 356), the Court disposed of the Nelsons' intentional tort claims on the ground that they were based upon activities which are "peculiarly sovereign." *Id.* at 361. Since the activities upon which the suit was based were peculiarly sovereign, the Court apparently saw no need to employ the test or explain precisely how the test is to be applied. Consequently, *Nelson* did not provide an example of a step-by-step analysis of the elements test, nor did it explain for the lower courts how to apply the test to future cases.

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space."); *Atkinson v. The Inter-American Development Bank*, 156 F.3d 1335 (D.C. Cir. 1998) (garnishment proceeding).

Significantly, the *Nelson* opinion went on to consider the Nelsons' negligent failure to warn claim. Again, the test was not applied. As Justice Kennedy notes in his dissenting opinion: "[T]he Court does not purport to analyze these claims in light of the statutory requirements for jurisdiction." *Nelson*, 507 U.S. at 373 (Kennedy, J., concurring in part and dissenting in part). Instead, the majority held that the failure to warn claim failed because *any* claim may be recharacterized as a negligent failure to warn, thereby eviscerating the FSIA. *Id.* at 363. The *Nelson* opinion thus provided the test, but not an example or explanation of how to apply the test.

Analytically, it could be that *Nelson* created a rule, then created an exception. The *Nelson* opinion held that for jurisdiction to attach under the FSIA elements of the claim must occur in the United States, but the opinion went on to specifically except negligent failure to warn claims from that test. Another exception has evolved in the case law for suits based on foreign judgments.[4]

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[4] The elements of a foreign judgment cause of action "are simply that the foreign judgment be final, conclusive and enforceable where rendered." *Transatlantic*, 204 F.3d at 389. As the *Transatlantic* court noted, if the test in *Nelson* is applied literally, it would, "in practice, preclude plaintiffs from enforcing *any* foreign judgments against foreign sovereigns in U.S. courts under Section 1605(a)(2)." Without deciding the issue, the Second Circuit noted that *International Housing v. Rafidain Bank Iraq*, 893 F.2d 8 (2d Cir. 1989), which was decided prior to *Nelson*, "is in some tension with a literal reading of the definition of 'based upon' used by the Supreme Court in *Nelson*." *Transatlantic*, 204 F.3d at 389 n.4.

Other exceptions seem sure to arise, and there are further problems with the *Nelson* test. For example, it is not clear to the lower courts whether the test applies only to the first clause of 28 U.S.C. § 1605(a)(2), which provides that a foreign state shall be immune in actions "based upon commercial activity carried on in the United States," or to all three clauses, including "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere" or an act outside the United States having a "direct effect" in the United States. *Compare Adler v. Federal Republic of Nig.*, 107 F.3d 720, 726 (9th Cir. 1997) (limiting *Nelson* to first clause) *with Voest-Alpine*, 142 F.3d at 892 ("all three clauses require that the cause of action be 'based upon' a certain act or activity of the foreign state, that is, the act or activity must form the basis of at least some element of the cause of action.")

In addition, determining where each element of a cause of action occurred is difficult and susceptible to a variety of interpretations. Prior to *Nelson*, there was no reason to decide where an element of a cause of action occurred, so there was no preexisting body of case law. By contrast, there are hundreds of years of case law to help courts determine the situs of a tort or contract. *See, e.g., The Eagle*, 75 U.S. 15 (1868) (tort); *Compania Gen. de Tabacos de Filipinas v. Collector of I.R.S.*, 275 U.S. 87 (1927) (contract).

Another significant problem is posed by choice of law considerations: If the elements of the cause of action determine jurisdiction, then whose law is to be applied? *Compare First Fidelity Bank, N.A. v. Government of Antigua & Barbuda – Permanent Mission*, 877 F.2d 189, 194-196 and

n.3 (2d Cir. 1989) (assuming without deciding that state law applied) *with Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 452 (2d Cir. 1990), *cert. denied*, 516 U.S. 1045 (1996) (applying federal law).

In this case, Taiwanese law should apply. *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), *cert. dismissed*, 497 U.S. 1058 (1990). The Ninth Circuit did not, however, analyze the elements of the claim under the applicable Taiwanese law. Jurisprudentially, courts should be required to determine which law applies before applying the *Nelson* test. *See Gates v. Victor Fine Foods*, 54 F.3d 1457, 1464 (9th Cir. 1995), *cert. denied*, 516 U.S. 869 (1995) ("We agree with the Second Circuit that it is improper to rely on substantive law as a basis for a finding of jurisdiction under the Act.")

In sum, as numerous courts have noted, Congress did not provide much guidance when it drafted the FSIA. *See The Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1473 (9th Cir. 1995), *cert. denied*, 525 U.S. 1141 (1999). ("We are not the first court to acknowledge the confusing nature of the language and structure of 28 U.S.C. § 1605.") Seven years ago, this Court arrived at the *Nelson* test to determine when a claim is "based upon" commercial activity. Taiwan very respectfully suggests that the test should be clarified so that there is greater predictability and uniformity in the law. Additionally, as outlined in the following section, Taiwan alternatively requests summary reversal of the Ninth Circuit's decision, because it directly conflicts with *Saudi Arabia v. Nelson*.

II. *SUN v. TAIWAN* DIRECTLY CONFLICTS WITH *SAUDI ARABIA v. NELSON*, 507 U.S. 349 (1993).

A. The Ninth Circuit Found That Jurisdiction May Be Asserted Over Taiwan For "Failing To Disclose" Information, But *Nelson* Precludes Claims Based Upon Negligent Failure To Warn.

As noted, *Nelson* precludes United States courts from asserting jurisdiction over foreign sovereigns based on claims for negligent failure to warn (*Nelson*, 507 U.S. at 363), but that is precisely what the Ninth Circuit did in this case. In *Nelson*, the plaintiffs asserted intentional torts against Saudi Arabia. In addition, plaintiffs alleged a separate cause of action for negligent failure to warn. The Court wrote:

> The Nelsons allege that, at the time petitioners recruited Scott Nelson and thereafter, they failed to warn him of the possibility of severe retaliatory action if he attempted to disclose any safety hazards he might discover on the job. In other words, petitioners bore a duty to warn of their own propensity for tortious conduct. But this is merely a semantic ploy. **For aught we can see, a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it. To give jurisdictional significance to this feint of language would effectively thwart the [Foreign Sovereign Immunities] Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity.**

Nelson, 507 U.S. at 363. (Citations omitted and emphasis added.)

In spite of this clear directive, the Ninth Circuit gave jurisdictional significance to Plaintiffs' new theory, raised for the first time on appeal, that "Taiwan was under an affirmative duty to exercise reasonable care by disclosing known information concerning prospective dangers on the tour and by not misleading prospective participants." *Sun*, 201 F.3d at 1110. How is failing to "disclos[e] known information concerning prospective dangers" different from "failing to warn . . . of otherwise undisclosed dangers"? *Nelson*, 507 U.S. at 354.

In this case, Mr. Sun drowned in Taiwan, he was supervised in Taiwan and the beach was selected in Taiwan. The only activity Taiwan carried on in the United States was the recruitment of Mr. Sun. As in *Nelson*, there is no other basis for jurisdiction. The Ninth Circuit attempts to distinguish *Nelson*, but the holding in *Nelson* is clear: Jurisdiction over foreign sovereigns may not be based upon recruiting activity or a claim for negligent failure to warn.[5]

To make matters worse, the "California law," referred to in the opinion without citation (*Sun*, 201 F.3d at 1110), consists of a single case, *McCollum v. Friendly Hills Travel Ctr.*, 172 Cal. App. 3d 83 (1985), which is itself a failure to warn case. In *McCollum*, a man sued his travel agents for

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[5] The Ninth Circuit opines that "there is a duty to take reasonable care in arranging a tour itinerary" (*id.* at 1110 n.2), but, as the *Sun* court itself recognized, the tour itinerary was arranged in Taiwan. *Id.* at 1110. Because the beach had already been selected in Taiwan, any negligent "administrative promotion and application management" could only mean a failure to warn of the alleged dangers at the beach. Thus, even with this purported distinction, jurisdiction is barred by *Nelson*.

"their *failure to adequately warn* him of the dangers he would encounter while water-skiing at Negril Beach Village." *Id.* at 94 (italics added). The court concluded that the travel agent "did not breach a duty owed appellant by *not warning him* . . . . " *Id.* at 95 (italics added). Thus, Plaintiffs base their new theory upon a failure to warn case, something which is *specifically* barred by *Nelson*. Accordingly, this Court should summarily reverse the Ninth Circuit's decision.

B. Taiwan's Overseas Training Program Is "Peculiarly Sovereign," As The Police Activity In *Nelson* Was Peculiarly Sovereign.

The Ninth Circuit's decision may also be summarily reversed because, in contravention of *Nelson*, it ruled that the Overseas Training was "commercial activity carried on in the United States." 28 U.S.C. § 1605(a)(2). In *Nelson*, this Court held that a foreign state's exercise of its police power was "peculiarly sovereign in nature" and, therefore, not "commercial activity." *Nelson*, 507 U.S. at 361. The Overseas Training is also peculiarly sovereign: By the political design of the Taiwanese government, this subsidized Training is available only to people of Chinese descent and includes excursions to purely governmental establishments such as the Chinese Marine Corps, Air Force Academy and military bases (facilities which are not open to the general public or to tourists); and those participants who successfully complete the training receive educational credits from the National Taiwan Normal University (a state-run university). This Training may not be "exercised by private citizens." *Nelson*, 507

U.S. at 360. Given the geopolitical aspects and the nationalistic scope of the Training, this Court should find, as it did in *Nelson*, that the Training is "peculiarly sovereign." *Id.* at 361.

CONCLUSION

The "elements of the cause of action" test articulated by this Court in *Saudi Arabia v. Nelson* has unfortunately engendered confusion and a lack of uniformity in the lower courts. As a result, foreign sovereigns receive disparate treatment when sued in American courts. Certiorari should be granted to address this issue of international importance. As noted, this same issue is presented in the pending certiorari petition in *Kelly*, 213 F.3d 841. Briefing on the merits should be permitted so that this Court may create a more workable test for determining when claims are "based upon" commercial activity carried on in the United States. In the alternative, Taiwan seeks summary reversal because the Ninth Circuit

did not follow the binding precedent laid down by this Court in *Nelson*.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TEI YAN SUN; YEH HWA SUN, Individually and as Personal Representatives of Peter Sun, deceased; PHILIPE SUN, *Plaintiffs-Appellants,* v. TAIWAN; TAIPEI ECONOMIC AND CULTURAL REPRESENTATIVE OFFICE IN THE U.S.; CHINA YOUTH CORPS; OVERSEAS CHINESE AFFAIRS COMMISSION, *Defendants-Appellees.*	No. 98-17166 D.C. No. CV-94-02769-SI OPINION

Appeal from the United States District Court
for the Northern District of California
Susan Illston, District Judge, Presiding

Argued and Submitted
November 2, 1999 – Pasadena, California

Filed February 3, 2000

Before: Harry Pregerson, John T. Noonan, and
Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge O'Scannlain

SUMMARY

Torts/Defenses

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that under the Foreign Sovereign Immunity Act (FSIA), a foreign state's sponsorship of a tour to promote understanding of its culture and history constitutes "commercial activity" that is excepted from the statute's protection against tort liability.

Peter Sun, an American student of Taiwanese descent, drowned while participating in a cultural tour sponsored by the government of appellee Taiwan. Taiwan's administrative promotion and application management took place in the United States; the participants were not charged for the tour.

Peter's family brought a wrongful death action against Taiwan and various agencies connected with the tour. In their complaint, the Suns alleged claims based on negligence in failing to provide a reasonably safe tour with adequate supervision, and failure to warn Peter about dangerous swimming conditions at the beach where he drowned.

Taiwan moved to dismiss for lack of subject-matter jurisdiction on the ground that the Suns' suit was not based on commercial activity by Taiwan in the United States, as required by the FSIA if the plaintiffs were to avoid the statute's overall provision of sovereign immunity.

The district court concluded that the defendants' activities constituted "commercial activity" under the FSIA. However, the court concluded that the Suns' claim was not based on that activity, but on conduct that occurred entirely in Taiwan. Accordingly, the court dismissed the complaint for lack of subject-matter jurisdiction.

On appeal, the Suns changed the thrust of their theory of recovery to emphasize the connection between their action and Taiwan's commercial activity in the United States. They argued that like other tour organizers, Taiwan was under an affirmative duty to exercise reasonable care by disclosing known information concerning prospective dangers on the tour, and by not misleading prospective participants. The Suns also alleged that Taiwan's requirement, made known to them in the United States, that Peter participate in the beach excursion without disclosing the dangers, constituted the basis for their action for negligent misrepresentation.

The FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country. Immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts. Unless a statutory exception applies, no court has subject-matter jurisdiction over a claim brought against a foreign country or its instrumentalities.

The FSIA defines commercial activity as either a regular course of commercial conduct, or a particular commercial transaction or act. A state engages in commercial activity when it exercises only those powers that can be

exercised by private citizens, as distinct from those powers peculiar to sovereigns.

Promoting and operating a cultural tour is an activity that could be and regularly is conducted by private players in the market. The question is not whether the foreign sovereign is acting with a profit motive, or instead with the aim of fulfilling uniquely sovereign objectives. Whether a state acts in the manner of a private party is a question of behavior, not motivation. Thus, in evaluating Taiwan's activities, the court of appeals looked to the state's acts as opposed to the reason for its acts. Taiwan may have been acting to promote Chinese culture, and this may have been a motivation that would inspire very few private tour operators, but its actions as a promoter, organizer, and guide were acts of a kind undertaken regularly by private parties. The district court correctly held that Taiwan's conduct constituted commercial activity.

For the district court to have subject-matter jurisdiction, the Suns' action had to be "based upon" Taiwan's commercial activity carried on in the United States. The phrase "based upon" is read to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case. This requires a nexus between the action and the commercial activity.

As presented to the district court, the Suns' case was that Peter's death was caused by a negligent failure to exercise reasonable supervision. This was how the court interpreted the theory of the Suns' case when it found that all the commercial acts on which the claim was based

took place in Taiwan, and consequently dismissed the action.

An action is based on commercial activity in the United States if *an element* of the claim consists in conduct that occurred in commercial activity carried on in the United States. The entire case need not be based on the commercial activity of the defendant. The district court correctly concluded that the Suns' action was not based on Taiwan's activity in the United States. The promotion and application process in the United States was not conduct involved in proving any of the elements of the Suns' action. The only relevant conduct was failure to take reasonable care in allowing the students to swim, and failure to supervise them. All this occurred in Taiwan.

However, this was not the end of the matter, because the Suns changed their theory of the case in their appellate briefs to emphasize the nexus between their action and Taiwan's commercial activity in the United States. The district court should on remand review the Suns' claim to determine whether, as currently cast, it was based on commercial activity that took place in the United States.

COUNSEL

Paul Gary Sterling (argued), Sterling & Clack, San Francisco, California, for the plaintiffs-appellants.

David Yang (argued), San Francisco, California, for the defendants-appellees.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether the United States courts have jurisdiction to hear claims brought by a participant in a cultural tour organized and operated by a foreign government in its own country.

I

On August 8, 1993, Peter Sun, an American student of Taiwanese descent, drowned off the coast of Ken-Ting National Park in Taiwan where he was participating in a cultural tour sponsored by the government of Taiwan. His family ("the Suns") brought a wrongful death action against Taiwan, Taipei Economic and Cultural Representative Office ("TECRO," formerly Coordination Counsel for North American Affairs ("CCNA")), Overseas Chinese Affairs Commission ("OCAC"), and Chinese Youth Corps ("CYC") (collectively "Taiwan") in district court alleging jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 et seq. ("FSIA").

Since 1967, Taiwan has organized and sponsored a summer-long study tour for youth of Taiwanese descent (the vast majority of whom have been American) to promote understanding of Chinese culture and history. In exchange for $400, Taiwan provided classes in Chinese language and culture, tours, sightseeing trips, room, and board. The promotional and application materials were sent from TECRO's office in Chicago and the applications

were returned to the San Francisco office. As air transportation was the responsibility of the participants, the entire tour began and ended in Taiwan.

During the final sightseeing event of the program, Sun drowned. After the district court dismissed with leave to amend the Suns' first complaint for lack of subject matter jurisdiction and for failure to state a claim against CCNA, the Suns filed the complaint at issue here. The Suns' second amended complaint alleged that Taiwan's negligence in failing to provide a reasonably safe tour with adequate supervision and failure to warn their son about the dangerous swimming conditions off the beach caused the death of their son. Taiwan filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction claiming that the Suns' suit was not based on commercial activity by Taiwan in the United States, as required by the FSIA. The district court found that the defendants' actions constituted "commercial activity," but concluded that the Suns' cause of action was not based on this commercial activity. Accordingly, the district court dismissed the complaint for lack of subject matter jurisdiction.

The Suns timely appealed.[1]

II

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country."

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[1] The district court also dismissed the Suns' action against CYC for lack of personal jurisdiction. The Suns do not appeal this aspect of the district court's decision.

Argentine Republic v. Amerada Hess Shipping Co., 488 U.S. 428, 443 (1988). This Act codifies the restrictive, as opposed to absolute theory, of sovereign immunity in which "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983). Under the FSIA, unless a statutory exception applies, no court has subject matter jurisdiction over a claim brought against a foreign country or its instrumentalities. *See* 28 U.S.C. § 1604.

The exception to immunity relevant to this case provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state. . . . " 28 U.S.C. § 1605(a)(2). No party on this appeal disputes the characterization of all the defendants as falling within the FSIA's definition of a foreign state, which includes "an agency or instrumentality of a foreign state." 28 U.S.C. §§ 1603(a), (b). Thus the question on appeal is whether the Suns' "action is based upon a commercial activity carried on in the United States."

III

A

First, therefore, we must decide whether the district court correctly held that the conduct of Taiwan constituted "commercial activity." The FSIA defines commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C.

§ 1603(d). Further, "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* The Supreme Court has held "that a state engages in commercial activity . . . where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns." *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993) (quotations and citations omitted).

The district court found that Taiwan engaged in commercial activity. Promoting and operating a cultural tour is an activity that could be and regularly is conducted by private players in the market. Taiwan argues that its activities are not commercial because it operates this tour without charging the participants and runs it in order to promote understanding of Chinese culture and foster closer ties among Chinese people. The Supreme Court, however, has declared both of these considerations irrelevant. First, "the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (holding that state refinancing of government bonds is commercial activity despite the governmental motivation). Second, "whether a state acts in the manner of a private party is a question of behavior, not motivation." *Nelson*, 507 U.S. at 360; *see also* 28 U.S.C. § 1603(d) ("The commercial character of an activity shall be determined by reference to its nature, rather than by reference to its purpose."). Thus in evaluating Taiwan's activities we look to the state's acts as opposed to the reason for its

acts. Here, Taiwan may be acting in order to promote Chinese culture and this may in fact be a motivation that would inspire very few private tour operators, but its actions as a promoter, organizer and guide are undoubtedly acts of a kind that are undertaken regularly by private parties. This activity "is of the type that an individual would customarily carry on for profit." *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 780 (9th Cir. 1991) (holding that jurisdiction existed under the act where the Mexican government's activity consisted of maintaining a transportation link between its plant in Mexico and the plant's San Diego office). Thus the district court correctly held that Taiwan's conduct constituted commercial activity.

B

Taiwan argues that the activity is not commercial because no private party would sponsor a non-profit cultural tour to foster ties with individuals of Chinese descent overseas and promote understanding of Chinese culture. The Act requires, however, that we look only to the nature, not the purpose, of the activity. *See* 28 § 1603(d). Trying to blur this distinction, Taiwan relies on *Joseph v. Office of the Consulate*, 830 F.2d 1018 (9th Cir. 1987), for the proposition that "the purpose of an act may be relevant in defining its nature: often the essence of an act is defined by its purpose." 830 F.2d at 1023 (quotations and citations omitted). It also analogizes its activities to the compilation of a linguistic treatise found to be non-commercial in *Intercontinental Dictionary Series, Inc. v. De Gruyter*, 822 F. Supp. 662 (C.D. Cal. 1993). These arguments are unpersuasive.

Joseph's mention that the nature and purpose of an act are interrelated should be read as little more than an observation. Taiwan's suggestion that this statement downplays the distinction between the two flies in the face of the Supreme Court's blunt admonition that the clear statutory language of the FSIA "unmistakably commands" distinguishing nature from purpose. *Weltover*, 504 U.S. at 617. In fact, in *Weltover* the Supreme Court cast serious doubt on the specific language quoted in *Joseph* and relied on by Taiwan, as well as the notion that the distinction between the two is formalistic. *See id.* "We think this line of argument is squarely foreclosed by the language of the FSIA." *Id.* Reading this statement in *Joseph* to say no more than that nature and purpose are related is also consistent with its holding that a foreign sovereign leasing its land for its consulate is by its nature a commercial activity despite its obvious sovereign purpose. Furthermore it comports with the later statement in that case that "an activity is public and noncommercial if it is one which *only* a sovereign state can perform." *Joseph*, 830 F.2d at 1024 (emphasis added). Thus understood, the case offers Taiwan little support. While the purpose of Taiwan's tour may not be one that would motivate a private tour promoter, the operation of a cultural tour – the nature of the activity in question – is a type of activity a private party would undertake for profit.

Taiwan's position thus rests on *De Gruyter*. In *De Gruyter*, the district court found that the compilation of a comprehensive linguistic treatise was non-commercial activity because it was "not of the type an individual would customarily carry on for profit." 822 F. Supp. at 676. In light of *Weltover* and *Nelson*, this case provides

Taiwan with little support. Compiling academic treatises is the kind of activity that private publishers do perform. While a private publisher may have never compiled this specific treatise because of the cost or lack of profit, this reasoning defines "type of activity" too narrowly. The phrase does not refer only to the specific act performed by the government, but rather to a category of conduct. No private party would refinance government debt either, but the Supreme Court has held this activity to be commercial. *See Weltover*, 504 U.S. at 614-16. "[T]here is nothing about the [publishing of the books] (except perhaps its purpose) that is not analogous to a private [publishing endeavor]." *Id.* at 615-16. In publishing this treatise, the Australian government certainly did not exercise "powers peculiar to a sovereign." *Nelson*, 507 U.S. at 360. Moreover, while correctly stating that profit motive is an improper consideration, the district court continually cited the lack of profit motive as reason why this was not an activity a private party would conduct. *See De Gruyter*, 822 F. Supp. at 676. Thus *De Gruyter* supplies insufficient authority for concluding that the district court incorrectly characterized Taiwan's activity as commercial.

IV

In order for the district court to have subject matter jurisdiction, the Suns' action must be "based upon" Taiwan's commercial activity carried on in the United States. The Supreme Court has explained that the phrase "based upon" "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Nelson*, 507 U.S. at 357. The

Ninth Circuit has specified that this requires a nexus between the action and the commercial activity. "The commercial activity relied upon . . . to establish jurisdiction must be the activity upon which the lawsuit is based. The focus must be solely upon those specific acts that form the basis of the suit." *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 796 (9th Cir. 1989) (citations and quotations omitted); *see also Barkanic v. General Administration of Civil Aviation*, 822 F.2d 11 (2d Cir. 1987) (holding that there must be a nexus between the commercial activity in the United States and the cause of action).

In their complaint, the Suns alleged negligence. Specifically, they alleged:

> (1) that while their son was a participant on the tour, "the defendants were under a general duty to provide a reasonably safe tour with adequate supervision;"
>
> (2) that "On August 8, 1993, at Ken-Ting Beach, defendants possessed a duty to exercise reasonable care in selecting a safe and guarded beach," to advise participants of where to swim and warn them of swimming hazards, and to change the itinerary if the beach were unsafe; and
>
> (3) that at no time did the defendants provide warnings regarding the dangers of swimming at the beach.

As presented to the district court in the Suns' Opposition to the Defendant's Motion to Dismiss, the theory of their case was that Peter's death was caused by a negligent failure to warn and a failure to exercise reasonable supervision. This is how the district court interpreted the

theory of the Suns' case when it found that all the commercial acts on which this claim was based took place in Taiwan and consequently dismissed the action.

"[A]n action is based on commercial activity in the United States if *an element* of the plaintiff's claim consists in conduct that occurred in commercial activity carried on in the United States" *Sugimoto v. Exportadora De Sal, S.A. De C.V.*, 19 F.3d 1309, [1311] (9th Cir. 1994) (emphasis added). The entire case need not be based on the commercial activity of the defendant. *See Nelson*, 507 U.S. at 358 n.4. Based on the Suns' argument to that point, the district court found that no element of their claim consisted of conduct that occurred in this country. The defendants' administrative promotion and application management took place in the United States. But this activity formed no part of the basis of the Suns' claim, which at that point rested on the negligent selection of the beach, negligent supervision, and failure to warn. Such a result was correct under *Nelson*. In arriving at the conclusion that there was no jurisdiction under the FSIA because the action was not based on commercial activity, the Supreme Court looked only to the specific conduct underlying the action, i.e., the detention and beating. *Id.* at 358, 361. The Court did not consider that the beatings were in connection with the running of the hospital, a commercial activity. *Id.* at 362-63. Consistent with this precedent, the district court correctly concluded that the Suns' action was not based on Taiwan's activity in the United States. The promotion and application process in the United States was not conduct involved in proving any of the elements of the Suns' action. The only conduct relevant to the action

was failure to take reasonable care in allowing the students to swim and failure to supervise them. All of this occurred in Taiwan.

This is not the end of the matter, however, because the Suns have changed their theory of the case in their appellate briefs to emphasize the nexus between their action and Taiwan's commercial activity in the United States. Relying primarily on California law, the Suns argue that, like other tour organizers, Taiwan was under an affirmative duty to exercise reasonable care by disclosing known information concerning prospective dangers on the tour and by not misleading prospective participants. Moreover, the Suns allege that Taiwan's requirement, made known to the Suns in the United States, that their son participate in the beach trip without disclosing the dangers constitutes the basis for their action for negligent misrepresentation.[2] In the briefs there is no longer any mention of negligent supervision. Although this argument differs significantly from that made in the district court on the motion to dismiss, the Suns cast the negligence language in their complaint broadly enough to cover this legal theory. Thus we cannot say that the issue

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[2] The Suns' action is not a failure to warn claim as characterized by Taiwan. Under the Suns' legal theory, tour organizers have a duty of care which arises from their arrangement and promotion of the trip. This is not the same as the attempt by the plaintiffs in *Nelson*, criticized by the Supreme Court, to turn their intentional tort claim into a failure to warn claim. The Suns' point is not that tour organizers have a duty to warn of their negligent acts, but rather that there is a duty to take reasonable care in arranging a tour itinerary.

was never raised previously and thus is not properly before us here.

Nevertheless, the district court should have the opportunity to review the Suns' claim first in order to determine whether, as currently cast, it is based on commercial activity that took place in the United States. Accordingly we remand to the district court so that it may make such a determination.[3]

AFFIRMED in part, REVERSED in part, and REMANDED. Each party shall bear their own costs.

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[3] Because we remand to the district court to determine whether it has jurisdiction under the FSIA, we do not address Taiwan's arguments that the case should nevertheless be dismissed under the Act of State doctrine or the doctrine of forum non conveniens.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TEI YAN SUN, ET AL., Plaintiffs, v. COORDINATION COUNCIL FOR NORTHERN AMERICAN AFFAIRS, Defendants.	No. C-94-2769 SI **ORDER OF DISMISSAL WITH LEAVE TO AMEND** (Filed Oct. 4, 1995)

On September 29, 1995, the Court heard argument on defendant's motion to dismiss and motion for summary judgment. Having considered the arguments of counsel and the papers submitted, the Court hereby GRANTS defendant's motion WITH LEAVE TO AMEND.

BACKGROUND

Defendant, Coordination Council for Northern American Affairs, is an instrumentality of the government of Taiwan that, among other things, assists the "Overseas Chinese Affairs Commission" ("OCAC") and the China Youth Corps ("CYC") – both Taiwanese governmental entities – in offering the "Overseas Chinese Youth Language Training & Study Tour" (the "Study Tour"). In 1993, Peter Sun, an American citizen, went on the Study Tour and drowned during a recreational visit to the beach at Ken-Ting National Park in Southern Taiwan. Defendant

has submitted evidence that its role in the Study Tour was limited to processing applications and providing a brief orientation for participants before the Study Tour began. Defendant has also submitted evidence that OCAC and CYC were responsible for running the Study Tour's activities in Taiwan.

Sun's parents and brother (collectively "plaintiff") brought this action for Sun's pain and suffering before his death and for wrongful death. The case is currently before the Court on defendant's motion to:

> . . . dismiss for lack of subject matter jurisdiction [FRCP 12(b)(1); or alternatively, to dismiss all claims for failure to state any claim for which relief can be granted [FRCP 12(b)(6)] and in the alternative for summary judgment under FRCP 56; or alternatively, to dismiss on the grounds of forum non conveniens [FRCP 1404 (a)]; or alternatively, to dismiss on the grounds of the act of state doctrine.

DISCUSSION

I. Legal Standard

Plaintiff has filed a motion to dismiss under Federal Rule of Civil Procedure 12(b) and a motion for summary judgment under Rule 56. A motion to dismiss may be properly granted if the moving party is entitled to judgment even if the facts alleged by the non-moving party are true and there is no set of facts under which the non-moving party could prevail. *Conley v. Gibson*, 78 S.Ct. 99, 101-02 (1957); *Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco*, 792 F.2d 1432, 1435 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 948 (1987). For the purpose of a

motion to dismiss, the plaintiff's allegations are accepted as true. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

Summary judgment is proper when there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. F.R.C.P. 56(e). The non-moving party must produce evidence of disputed issues of fact to survive summary judgment if the moving party is entitled to judgment as a matter of law based on the facts it puts forward. *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), citing *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986); *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103-04 (9th Cir.), *cert. denied*, 107 S.Ct. 437 (1986).

Federal Rule of Civil Procedure 12(b)(6) provides that "if . . . matters outside the pleadings are presented to and not excluded by the court, [a motion to dismiss] shall be treated as one for summary judgment and disposed of as provided in Rule 56." *See also Grove v. Mead School Dist. No. 354*, 753 F.2d 1528, 1532-33 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985); Wright & Miller, Federal Practice and Procedure: Civil 2d § 1366. Conversion of a motion to dismiss into a summary judgment motion is proper where the parties have notice that the matter may be considered as a motion for summary judgment. *Grove*, 753 F.2d at 1533. In addition, where a motion to dismiss raises an affirmative defense not apparent on the face of the pleadings, such as res judicata, conversion to a motion for summary judgment is proper. *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Inc.*, 185 F.2d 196, 205 (9th Cir.), *cert. denied*, 71 S.Ct. 506 (1951); Wright & Miller, § 1366.

In the instant case, plaintiff was on notice that defendant was moving both to dismiss and for summary judgment by the caption of defendant's moving papers and by defendant's submitting declarations in support of its motions.

II. The Foreign Sovereign Immunity Act

The Foreign Sovereign Immunity Act, 28 U.S.C § 1602, *et seq.* ("FSIA") "provides the sole basis for obtaining jurisdiction over a foreign state [and its instrumentalities] in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683, 692 (1989). Under FSIA, foreign states are presumptively immune from suit in the United States unless a specified FSIA exception applies. *Verlinden B.V. v. Central Bank of Nigeria*, 103 S.Ct. 1962, 1968-69 (1983).

In the present case, plaintiff argues that defendant is subject to this Court's jurisdiction under FSIA's "commercial activity exception." 28 U.S.C. § 1605(a)(2). Section 1605(a)(2) states:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> (2) in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of

> the foreign state elsewhere and that act causes a direct effect in the United States.

A. "Commercial Activity"

Defendant claims that the Study Tour was not a commercial activity under the FSIA because the focus of the study tour was "an understanding of Chinese history, culture, and achievements" and a fostering of "closer ties with overseas Chinese youth." Def.'s Mem. at 8. Defendant argues that this was not "commercial activity" because it was a non-profit venture for the purpose of promoting an understanding of Chinese culture and creating ties between Chinese youth around the world. In contrast, plaintiff claims that the Study Tour – a six-week tour of Taiwan including language instruction, cultural education, sight-seeing and travel – is precisely the type of activity a private party would engage in and, accordingly, is "commercial activity" for FSIA purposes.

The Supreme Court found that a foreign state engages in "commercial activity" if it acts "in the manner of a private player within the market" rather than "exercising those powers peculiar to sovereigns." *Saudi Arabia v. Nelson*, 113 S.Ct. 1471, 1479 (1993) (citations and quotation marks omitted). The Court further noted that "commercial activity" is determined by the actions involved, not the motivations behind those actions:

> We emphasized in *Weltover* that whether a state acts "in the manner of" a private party is a question of behavior, not motivations: "[B]ecause the Act provides that the commercial

> character of an act is to be determined by reference to its 'nature' rather than its 'purpose,' the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motives behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.' " *Id.* at 1479, quoting *Republic of Argentina v. Weltover,* 112 S.Ct. 2160, 2166 (1992) (emphasis in *Weltover*).

Thus, under *Nelson,* courts are to look to the actions undertaken rather than the purpose or motivation behind those actions to determine if the foreign state is engaged in commercial activity. The Study Tour is a tourist venture aimed at youth, comprised of language and cultural education as well as sight-seeing and travel and, accordingly, is a commercial activity under FSIA.

B. Clause One: The Claim is not "Based Upon" Commercial Activity Within the United States

Plaintiff claims that this action is based upon acts of the defendant in the United States that led to Sun's death in Taiwan. Defendant argues that its acts in the United States are not sufficiently closely related to Sun's drowning in Taiwan to fall within the first clause of the commercial activity exception.

In determining whether a lawsuit is based upon commercial activity in the United States, the Ninth Circuit has held that the district court must focus "solely upon 'those *specific* acts that form the basis of the suit.' " *America West*

Airlines, Inc. v. GPA Group, Ltd., 877 F.2d 793, 797 (9th Cir. 1989), quoting *Joseph v. Office of the Consulate General*, 830 F.2d 1018, 1023 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1077 (1988) (emphasis in *Joseph*); *Nelson, supra*, 113 S.Ct. at 1478 ("something more than a mere connection with, or relation to, commercial activity" is required under clause one of commercial activity exception).

In the present case, defendant's acts are limited to distributing, accepting and confirming applications for the Study Tour, accepting payment on behalf of OCAC and CYC for the Study Tour and conducting a briefing for participants before their departure for Taiwan. Kang Seng Tsai Dec'l at 3-4; Def.'s Mem. at 10. These acts by defendant in the United States are not sufficient for the Court to find that plaintiff's legal action is "based upon" these acts for FSIA purposes. For example, in *America West*, a jet engine caught fire and was destroyed in flight. The engine has been serviced by Airmotive, a subsidiary of Air Lingus. Air Lingus is an instrumentality of the Irish government. Airmotive's servicing of the engine took place in Ireland but Air Lingus has an on-going commercial presence in the United States. The Ninth Circuit found that Air Lingus' commercial operations in the United States were unrelated to the maintenance performed on the engine in Ireland and found that clause one of the commercial activities exception did not apply to a lawsuit for damages arising out of the destruction of the engine. *America West, supra*, 877 F.2d at 797.

In the present case, defendant's activities were limited to administrative tasks regarding the applications for the Study Tour. Defendant did not choose Ken-Ting National Park as a swimming site nor did defendant

participate in the supervision, or lack thereof, of the swimming that caused Sun's death. Plaintiff argues that FSIA only requires a nexus or a "connection or link" between defendant's acts in the United States and plaintiff's lawsuit. This interpretation is not supported by case law. Rather, the connection must be much closer than simply a "connection or link."

For example, in *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (2d Cir. 1980), the Second Circuit found that there was a sufficient connection between an airline ticket purchased in the United States and a lawsuit based on damages caused by the delay in the airline flight from Mexico to New York. 626 F.2d at 273. The connection in *Aeromexico* is much closer than the one alleged in the present case because the harm complained of arose directly out of Aeromexico's sale of the airline ticket in the United States.

Similarly, in *Barkanic v. General Administration of Civil Aviation*, 822 F.2d 11 (2nd Cir.), *cert. denied*, 108 S.Ct. 453 (1987), the Second Circuit found that an airline ticket purchased in the United States for a flight on a Chinese airline was a sufficient connection to bring the Chinese airline under the jurisdiction of American courts. 822 F.2d at 14. In *Barkanic*, the connection was very close because the ticket was purchased for a specific flight and the crash of that flight formed the basis of the plaintiff's suit.

Here, while there is a "but for" connection between Sun's death and defendant's accepting Sun's application for the Study Tour, there is no more substantial or logical connection than that. The connection between defendant's commercial acts in the United States and the facts

underlying plaintiff's lawsuit is too attenuated for this Court to exercise jurisdiction of defendant under clause one of the commercial activities exception to FSIA.

C. Clause Two: No act occurred in the United States upon which the suit is based

Defendant argues that the acts leading to this lawsuit, i.e., failure to warn and/or failure to properly supervise the swimming, occurred in Taiwan and, therefore, clause two does not provide an exception to foreign sovereign immunity. Plaintiff has offered no legal or factual argument on this issue and it is undisputed that the alleged negligent acts and/or omissions occurred in Taiwan. Accordingly, the Court finds that clause two does not provide an exception to foreign sovereign immunity.

D. Clause Three: No direct effect in the United States

Under the third clause of FSIA, American courts can exercise jurisdiction over foreign states if the legal action is based on an act that occurred outside the United States but that causes a direct effect in the United States. Defendant has provided extensive legal authority that personal injuries, including wrongful death, do not have a direct effect in the United States as a matter of law. *See, e.g., Martin v. Republic of South Africa,* 836 F.2d 91 (2nd Cir. 1987); *Zernicek v. Brown & Root, Inc.,* 826 F.2d 415, 417 (5th Cir. 1985), *cert. denied,* 108 S.Ct. 775 (1988); *Harris v. VAO Intourist,* 481 F.Supp. 1056, 1062 (E.D.N.Y. 1979). Plaintiff has offered no contrary authority. Accordingly, the Court

finds that clause three does not provide an exception to foreign sovereign immunity.

III. Proper Defendants

In addition to claiming that defendant is not immune from suit due to the exceptions within FSIA, plaintiff argues that defendant is "the juridical equivalent" of Taiwan. Pl.'s Mem. at 6. Plaintiff relies on *Millen Industries, Inc. v. Coordination Council for North American Affairs*, 855 F.2d 879 (D.C. Cir. 1988). At oral argument, plaintiff stressed its position that defendant is the Taiwanese government for the purpose of this lawsuit and is responsible for the acts and omissions of all the agencies and ministries of the government of Taiwan. Plaintiff also requested leave to amend its complaint if necessary.

The Court finds that plaintiff has not pled sufficient facts to support its position that defendant is legally responsible for the act and/or omissions of CYC and OCAC nor provided sufficient factual support to withstand defendant's dispositive motion. Plaintiff, however, will be granted leave to amend to allege facts supporting this position or to name OCAC and/or CYC as defendants. Because defendant has provided admissible evidence in support of its summary judgment motion that it was not responsible for operating the Study Tour, plaintiff must provide admissible evidence creating a genuine issue of fact on this point in order to survive defendant's summary judgment motion.

CONCLUSION

For the foregoing reasons, and good cause appearing, the complaint is DISMISSED WITH LEAVE TO AMEND within thirty days of the date of this order. Defendant's motion for summary judgment is denied without prejudice to its renewal after the Amended Complaint is filed.

IT IS SO ORDERED.

Dated: October 3, 1995.

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TEI YAN SUN and YET HWA SUN, individually and as personal representatives of PETER SUN, deceased, and PHILIPE SUN,

Plaintiffs,

v.

TAIWAN, TAIPEI ECONOMIC AND CULTURAL REPRESENTATIVE OFFICE IN THE U.S., CHINA YOUTH CORPS, and OVERSEAS CHINESE AFFAIRS COMMISSION,

Defendants.
_____/

No. C 94-2769 SI

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

(Filed Oct. 15, 1998)

On October 9, 1998, the Court heard oral argument on defendants' motion to dismiss. Having considered the arguments of counsel and the papers submitted, the Court hereby GRANTS the defendants' motion.

BACKGROUND

Defendant Taipei Economic & Cultural Representative Office ("TECRO") is an instrumentality of the government of Taiwan that, among other duties, assists defendant Overseas Chinese Affairs Commission ("OCAC") and, through OCAC, defendant China Youth Corps ("CYC") in offering the "Overseas Chinese Youth Language Training & Study Tour" (the "Tour"). In 1993 Peter Sun, an American citizen, participated in the Tour and drowned during a recreational visit to the beach at Ken-Ting National Park in southern Taiwan. Sun's parents and brother brought this action for Sun's pain and suffering before his death and for wrongful death.

On October 4, 1995, this Court dismissed plaintiffs' First Amended Complaint for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605, with leave to amend. On October 19, 1995, plaintiffs filed a Second Amended Complaint, naming Taiwan, TECRO, CYC, and OCAC as defendants. On August 26, 1996, defendants moved to dismiss plaintiff's Second Amended Complaint for lack of jurisdiction. On October 8, 1996, this Court granted the plaintiffs limited discovery regarding the interrelationship among the defendants, and the scope, nature, and extent of the defendants' activities in the United States, and continued the hearing on defendants' motion to dismiss. On March 13, 1997, this Court granted plaintiffs' motion to compel a deposition of Kenneth Tsai, whom plaintiffs believed to be the director of an office in San Francisco that represented the interests of defendant OCAC. That deposition was limited to seven specific topics of inquiry. Defendants filed a petition for a writ of

mandamus with the Ninth Circuit, arguing this Court could not compel Mr. Tsai's testimony regarding information he possessed solely by virtue of his official position. On October 16, 1997, the Ninth Circuit ruled that Mr. Tsai was required to make himself available for deposition to be questioned, but only about the matters referred to in the declarations he submitted on behalf of the defendants. *Taiwan v. United States Dist. Ct.*, 128 F.3d 712, 719-20 (9th Cir. 1997). The Ninth Circuit also held that Mr. Tsai could refuse to answer any question that would reveal information he possessed solely by virtue of his official position, and that this Court could not compel him to answer. *Id.* at 720. If Mr. Tsai refused to answer questions about the matters referred to in the declarations, however, this Court could strike the pertinent parts of his declaration, or his declaration in its entirety. *Id.* at 719.

On May 4, 1998, and August 5, 1998, Mr. Tsai made himself available for deposition, answering some questions and refusing to answer others based on immunity. Plaintiffs have moved to strike Mr. Tsai's declarations and for sanctions, based on Mr. Tsai's refusal to answer questions at the deposition and on the objections interposed by Mr. Tsai's counsel.

This Court must now address defendants' motions to dismiss plaintiffs' Second Amended Complaint, with the record as it stands. All parties have filed supplemental briefing.

In their complaint, plaintiffs allege that TECRO, OCAC and CYC were instrumentalities of Taiwan. Second Amended Complaint ¶ 8. Plaintiffs allege that defendants

"were integral in the application process and the day to day operations of the Tour, including staff selection and training, preparation of the Tour itinerary, selections of tour destination, supervision, and enforcement of Tour rules and guidelines." Second Amended Complaint ¶ 8.

Plaintiff's allege that defendants Taiwan, TECRO, OCAC and CYC are not immune under the FSIA because they have engaged in commercial activity in the United States, "including, but not limited to advertising, soliciting, selecting and enrolling citizens of the United States, and accepting payment of tour fees." Second Amended Complaint ¶ 10. In the alternative, plaintiffs also allege that "CYC, as a nonprofit foundation and corporation, . . . is not entitled to immunity under the Foreign Sovereign Immunities Act." Second Amended Complaint ¶ 11.

To support their cause of action, plaintiffs allege that Peter Sun's injuries and death were caused by defendants' failure to provide reasonable supervision; to disclose the lack of life saving equipment at the beach; to provide life saving equipment at the beach; to disclose that swimming was prohibited at the beach; to inform Tour participants of the high waves and strong undertow at the beach; to inform the Tour participants that the signs in Mandarin Chinese warned visitors to remain out of the water; and to warn participants of an approaching typhoon which affected the conditions at the beach. Second Amended Complaint ¶ 19. Plaintiffs also allege that defendants failed to exercise reasonable supervision of the swimming activity and failed to exercise any reasonable effort to rescue the decedent. Second Amended Complaint ¶ 19.

In their supplemental opposition, plaintiffs set forth facts obtained in discovery that they believe are sufficient to defeat defendants' motion to dismiss. These include the following:

> (1) Mr. Cheng, during 1993, and then Mr. Tsai were the director [sic] of the Chinese Cultural Center in San Francisco, which continues to be operated and funded by OCAC.
>
> (2) OCAC provides funding and assistance in the form of books and other educational materials to Chinese language schools in the United States and other "assistance" to United States Chinese-American media, including newspapers.
>
> (3) OCAC gives funding to overseas Chinese businesses in the United States in the form of guarantees on loans from California banks with which it has special relationships.
>
> (4) OCAC designed, directed and controlled the Study Tour.
>
> (5) The Ministry of Foreign Affairs, and its section, TECRO, were directly involved in the planning, organization and coordination of the Study Tour.
>
> (6) The Ministry of Foreign Affairs (including TECRO) and OCAC were part of the Executive Yuan of the Republic of China (Taiwan) and subject to its control.

Supplemental Opposition, 12:6-23.

Defendants offer several declarations in addition to those of Mr. Tsai. These include the Amended Declaration of Dr. Tse Weio-Pan, Director of CYC, dated December 4,

1996, and two declarations from Steven S.K. Chen, Director, Second Department of Overseas Chinese Affairs Commission, Taiwan, Republic of China, dated August 26, 1996, and July 28, 1995.

Defendants Taiwan, OCAC and TECRO (the "Taiwan defendants") have moved to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. The Taiwan defendants have also moved to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. CYC has moved to dismiss on the same grounds as the Taiwan defendants, and also for lack of personal jurisdiction, Rule 12(b)(2), and for lack of service of process, Rule 12(b)(5).

LEGAL STANDARD

Where written submissions and affidavits are presented, but there is no evidentiary hearing, a plaintiff must present a prima facie showing of jurisdictional facts to defeat a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2). *Omeluk v. Lansten Slip & Batbyggeri A/S*, 52 F.3d 267, 268 (9th Cir. 1995); *Data Disc, Inc. v. Systems Tech. Assoc. Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977).

Where a foreign state challenges subject matter jurisdiction based on immunity under the FSIA, the foreign state bears the burden of persuasion on the issue of immunity. *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994). However, "once a prima facie showing of immunity has been made, the plaintiff seeking to litigate in the district court bears the burden of coming

forward with facts showing that as exception applies." *Id.* On a challenge to subject matter jurisdiction, the court has authority to resolve factual disputes, and discretion to devise a method for making a determination with regard to the jurisdictional issue. *Id.* The court has discretion to consider evidence presented beyond the pleadings, including affidavits and discovery. *Id.* The Court is not required to hold an evidentiary hearing. *Id.* at 173.

A motion to dismiss for failure to state a claim will be denied unless it appears the plaintiffs can prove no set of facts which would entitled [sic] them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99 (1957); *Fidelity Fin. Corp. v. Federal Home Loan Bank of San Francisco*, 792 F.2d 1432, 1435 (9th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 S. Ct. 949 (1987). All material allegations in the complaint are taken as true and construed in the light most favorable to the plaintiffs. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

DISCUSSION

Defendants TECRO, Taiwan, and OCAC base their motion to dismiss on two grounds. First, the Taiwan defendants argue this Court lacks subject matter jurisdiction over defendants TECRO, Taiwan, and OCAC under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2). Second, the Taiwan defendants argue that the Second Amended Complaint against defendants Taiwan and OCAC is barred by the applicable statute of limitations.

Defendant China Youth Corp [sic] ("CYC") bases its motion to dismiss on several grounds. First, CYC also

argues that this Court lacks subject matter jurisdiction over it under the FSIA. Second, CYC argues that plaintiffs' claims against it are barred by the statute of limitations. Third, CYC argues that this Court lacks personal jurisdiction over it. Fourth, CYC argues it was not properly served with the summons and Second Amended Complaint.

Plaintiffs' opposition primarily addresses two areas. First, plaintiff's argue that certain facts obtained in discovery show that defendants TECRO, Taiwan, OCAC, and CYC engaged is activities that bring them within the commercial activity exception to FSIA immunity. Second, plaintiffs argue that the Second Amended Complaint is not time barred because it relates back under Rule 15(c) of the Federal Rules of Civil Procedure.

1. The Commercial Activity Exception to FSIA Immunity.

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state [and its instrumentalities] in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp*, 488 U.S. 428, 443, 109 S. Ct. 683, 692 (1989). Under the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States," with a few limited exceptions. 28 U.S.C. § 1604. That immunity extends to "a political subdivision of a foreign state." 28 U.S.C. § 1603. Although the United States does not maintain diplomatic relations with Taiwan, Taiwan is a foreign state within the meaning of the FSIA. 22 U.S.C. § 3303(b)(1). TECRO and OCAC are instrumentalities of Taiwan, and therefore also immune from the jurisdiction

of U.S. courts, absent an applicable exception under the FSIA. Because plaintiffs also argue, over the objections of defendants, that CYC is a government instrumentality, the applicability of the FSIA to CYC is analyzed here as well.

Plaintiffs argue that defendants are subject to this Court's jurisdiction under the FSIA "commercial activity" exception, 28 U.S.C. § 1605(a)(2), which provides exceptions to immunity where

> [1] the action is based upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Id. Each clause of § 1605(a)(2) is analyzed in turn below.

A. Based Upon a Commercial Activity in the United States.

Under the first clause of § 1605(a)(2), plaintiffs must show that their claims are "based upon a commercial activity carried on in the United States," The Supreme Court has found that a foreign state engages in "commercial activity" if it acts "in the manner of a private player within the market" rather than "exercising those powers peculiar to sovereigns." *Saudi Arabia v. Nelson,* 507 U.S. 349, 360, 113 S. Ct. 1471, 1479 (1993). This Court has already determined that the Tour here, a tourist venture aimed at youth, is a commercial activity under the FSIA.

Order of October 4, 1995, 6:1-4. Thus the question is whether plaintiffs have shown that their wrongful death claim is "based on" defendants' commercial activity in the United States.

The Supreme Court has held that the phrase "based upon" in the first clause of § 1605(a) "is read most naturally to mean those elements of a claim that, if proven, would entitled [sic] a plaintiff to relief under his theory of the case." *Id.*, 507 U.S. at 357, 113 S. Ct. at 1477 (1993). "[T]he cause of action must arise directly from the defendant's commercial activities in the United States in order for the first clause of the commercial activity exception to apply." *Federal Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270 (3rd Cir. 1993), *cert. denied*, 511 U.S. 1107, 114 S. Ct. 2101 (1994). This requires that "the commercial activity that provides the jurisdictional nexus with the United States . . . also be the activity on which the lawsuit is based." *Stena Rederi AB v. Comison de Contratos del Comite*, 923 F.2d 380 (5th Cir. 1991). "[C]ourts focus only on those *specific* acts that form the basis of the suit" when determining whether the exception applies. *Joseph v. Office of Consulate Gen.*, 830 F.2d 1018, 1023 (9th Cir. 1987), *cert. denied*, 485 U.S. 905, 108 S. Ct. 1077 (1988) (emphasis in the original). Thus, this Court must inquire into whether defendants' commercial activities in the United States form the basis for the plaintiffs' action, against the foreign sovereign or its instrumentalities.

Plaintiffs allege a negligence cause of action for the injuries and death of Peter Sun. Plaintiffs base this cause of action on the allegations that defendants failed to provide reasonable supervision of tour participants at the beach, failed to disclose to Peter Sun that the beach did

not have adequate life saving equipment, failed to provide lifesaving equipment, failed to translate warning signs at the beach, and failed to warn Peter Sun about high waves and a strong undertow. Second Amended Complaint ¶ 19. In addition, plaintiffs allege defendants failed to exercise reasonable supervision, and failed to exercise any reasonable effort in attempting to rescue Peter Sun. Second Amended Complaint ¶ 19.

All of the actions of the defendants on which plaintiffs' cause of action is based took place in Taiwan. Although plaintiffs do allege commercial activities by defendants in the United States, those activities do not form the basis for plaintiffs' cause of action. For example, plaintiffs argue that defendant TECRO made news announcements in Chinese newspapers regarding the Tour, distributed tour application forms, transmitted the application forms to OCAC (in Taiwan) for eligibility screening, notified applicants that were accepted, accepted tuition payments, distributed briefing materials, retained an administrative fee from the tuition fees submitted by applicants, and conducted a briefing prior to the applicants' departure for Taiwan, Brodsky Decl. of February 14, 1997, Exhibits 9, 13. Plaintiffs also rely on evidence that TECRO communicated with OCAC in Taipei regarding replacement students for the 1993 tour, transmitted tuition checks, and transmitted documents regarding participants in the tour. Sun. Decl. of February 14, 1997, Exhibits 6-7; Brodsky Decl. of September 11, 1998, Exhibit 15. These actions, however, are primarily administrative, and do not form the basis of plaintiffs' cause of action against defendants. *See* Order of October 4, 1995 at 7:16-18.

Plaintiffs essentially argue that but for defendants' recruiting activities in the United States, Peter Sun would not have joined the Tour and drowned due to defendants' negligence. The Supreme Court rejected a similar line of reasoning in *Nelson*. There, the plaintiff was recruited to work in a state-owned hospital in Saudia Arabia. When he reported unsafe conditions at the hospital, he was arrested and subjected to torture. The plaintiff in *Nelson* argued that the defendants recruited him in the United States via newspaper articles, and signed an employment contract with him in the United States. The Court held that "[w]hile these activities led to the conduct that eventually injured the Nelsons, they are not the basis for the Nelsons' suit." *Nelson*, 113 S. Ct. at 1478. Similarly here, while defendants' activities in the United States recruiting for the Tour may have led to the conduct that resulted in Peter Sun's death, they are not the basis for plaintiffs' suit.

Through discovery, plaintiffs have uncovered certain facts which, they argue, demonstrate the relationship among defendants Taiwan, OCAC, CYC and TECRO, as well as defendants' activities in the United States. Assuming, without deciding, that all defendants are in fact related, plaintiffs still have not shown that their cause of action is based on the defendants' commercial activities *in the United States*.

For example, plaintiffs rely on evidence that OCAC provided educational materials and supplies to Chinese language schools in the United States, and assistance to Chinese-American media in the United States, Tsai Depo, 72:24-73:5; 74:13-16; 83:2-17; 165:12-20, Exhibits 8 and 9 to Brodsky Decl. of September 11, 1998. Plaintiffs contend

that OCAC hosts art and cultural festivals in several cities in the United States. Supplemental Opposition 7:17-24. Plaintiffs also point out that OCAC helps Chinese businesses in the United States secure loans. Tsai Depo, 167:5-18, Exhibit 9 to Brodsky Decl. of September 11, 1998. While these activities might be commercial activities in the United States, they do not form the basis for plaintiffs' wrongful death cause of action against defendants.[1]

Plaintiffs also rely on evidence that the Taiwanese Ministry of Foreign Affairs participated in a planning meeting regarding the 1993 Tour. Tsai Depo, 203:11-204:11, Exhibit 9 to Brodsky Decl. of September 11, 1998. Plaintiffs, however, do not indicate where this meeting took place, present no evidence it took place in the United States, and do not indicate the connection between that planning meeting and the elements of their cause of action. Defendants present evidence that the functions of OCAC and CYC in designing and planning the Tour all took place in Taiwan. Chen Decl. of July 18, 1995, ¶ 29. Plaintiffs also argue that TECRO is under the command of the Ministry of Foreign Affairs. Supplemental Opposition, 9:14-10:6. Again, while this may establish a connection among the defendants, it does not show any commercial activities *in the United States* that form the basis of plaintiffs' cause of action against defendants.

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[1] Plaintiffs rely on evidence obtained from Internet web sites for much of this information. Because this Court finds that the facts put forward by plaintiffs are insufficient to invoke the commercial activities exception, it DENIES as moot defendants' motion to strike plaintiffs' evidence obtained from web sites.

Plaintiffs rely primarily on *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3rd Cir. 1980), and *Barkanic v. General Administration of Civil Aviation*, 822 F.2d 11 (2d Cir. 1987) to support their contention that the commercial activities exception applies. In *Sugarman*, the plaintiff sued for damages resulting from a delayed flight on Aeromexico, Inc., the national airline of Mexico, which was wholly owned by the Mexican government. The court in *Sugarman* noted that although the delay occurred while Sugarman was waiting for a flight from Mexico to New York, his tickets were purchased in New Jersey, and he had alleged continued injury after he returned home.

Barkanic involved a wrongful death action against a Chinese airline following the crash of a domestic flight in China in which two American passengers were killed. There, as in *Sugarman*, the passengers had purchased their tickets in New York. In addition, the Chinese airline operated flights from the United States to China, although the flight that was the subject of this lawsuit was a domestic flight within China. The *Barkanic* court concluded that the purchase of the ticket in New York created a contract, and that this was sufficient to create a nexus between defendants' commercial activities here and the plane crash in China.

Here, however, Peter Sun was not traveling to the United States when the incident at the beach occurred. Nor did he purchase an airline ticket from defendants in the United States as part of the overseas tour. The Tour did not begin until Peter Sun reached Taiwan and checked in. Chen Decl. of July 28, 1995, ¶ 9(a). Indeed, this Court has already held that the activities of defendants in the United States as they related to the tour were

insufficient to meet the commercial activity exception. Order of October 4, 1995, 7-8. The additional activities of defendants presented by plaintiffs, such as cultural events and loans to businessmen, are even more attenuated from the cause of action here. *See America West Airlines, Inc. v. GPA Group LTD.*, 877 F.2d 793, 797 (9th Cir. 1989) (damage to airplane engine resulting from defendant's overseas maintenance is unrelated to defendant's operation of a commercial airline in United States). Particularly in light of *Nelson*, which was decided after *Barkanic* and *Sugarman*, the connection between defendants' commercial activities associated with recruiting students and plaintiffs' cause of action here is not sufficient to meet the commercial activities exception. *See also Sugimoto v. Exportadora de Sal, S.A. De C.V.*, 19 F.3d 1309, 1311 (9th Cir. 1994) (holding that *Nelson* requires that an element of the plaintiff's claim must consist in conduct that occurred in commercial activity carried on in the United States).

B. Acts Performed in the United States in Connection with a Commercial Activity Elsewhere.

The actions alleged by plaintiff's leading to this lawsuit, *i.e.*, failure to warn and/or failure to properly supervise swimming, occurred in Taiwan. Plaintiffs offer no legal authority or arguments to suggest that this clause applies here, or that the alleged negligent acts and/or omissions did not occur in Taiwan. Accordingly, this Court finds that clause two does not apply here.

C. Acts Outside the United States that Cause a Direct Effect in the United States.

Plaintiffs have alleged one cause of action against defendants for the wrongful death of Peter Sun, based on his drowning at a beach in Taiwan. Cases have consistently held that personal injuries to American citizens while abroad generally do not have a direct effect in the United States. *See, e.g., Martin v. Republic of South Africa,* 836 F.2d 91, 95 (2d Cir. 1987) (finding no direct effect where an accident left the plaintiff a quadriplegic and dependent on U. S. government), *Zernicek v. Brown & Root Inc.,* 826 F.2d 415, 419 (5th Cir. 1985) ("[T]he personal injury or death of an American citizen while abroad is not direct within the meaning of the Act. . . . "), *cert. denied,* 484 U.S.-1043, 108 S. Ct. 775 (1988); *Harris v. VAO Intourist,* 481 F. Supp. 1056, 1062 (E.D. N.Y. 1979) (finding that a wrongful death overseas that leaves aggrieved relatives in the U.S. does not create a direct effect).

To demonstrate a direct effect, plaintiffs offer the theory that the Tour was a product and service directed at the United States, and therefore defendants' actions in the United States are analogous to the sale of a defective product that has been designed and manufactured in a foreign country but sold in the United States, causing the injury or death of a U.S. consumer. Plaintiff's rely on *Vermeulen v. Renault U.S.A., Inc.,* 985 F.2d 1534 (11th Cir. 1993), and *Aldy v. Valmet Paper Machinery,* 74 F.3d 72 (5th Cir. 1996) to support this theory.

In *Vermeulen,* the plaintiff was injured in a car crash while driving her Renault LeCar on a road near Lawrenceville, Georgia. She sued the manufacturer of the

car, Renault, for personal injuries. Renault was a corporation wholly owned by the French government, and claimed immunity under the FSIA. The plaintiff alleged that her accident on the Georgia road resulted from the negligent design and manufacture overseas of the LeCar passenger restraint system. The *Vermeulen* court found these allegations sufficient to show a direct effect within the United States, and therefore plaintiff's action fit within clause three of the commercial activities exception.

In *Aldy,* the survivors of two workers crushed to death in a paper machine sued Valmet, a manufacturer of paper machines in Finland, alleging faulty design and manufacture. The two workers died at a paper mill in Hodge, Louisiana. There, the court noted that the plaintiffs claimed that the workers' deaths were an immediate consequence of Valmet's negligent design and manufacturing of the paper machine, and therefore the plaintiffs had shown a direct effect in the United States.

In both *Vermeulen* and *Aldy,* the courts relied on the fact that the injury or death occurred in the United States to find that the actions of the defendants caused a direct effect in the U.S. That is not the situation here, where the accident occurred overseas in Taiwan. Moreover, it is unclear that a defective design and manufacture theory is applicable here, where there is no manufactured product and where plaintiffs have not pled this theory in their complaint. Based upon precedent concerning personal injuries overseas, clause three of the commercial activity exception does not apply here.

Plaintiffs have failed to show that the commercial activities exception to immunity under the FSIA applies

here. Therefore, this action must be dismissed for lack of subject matter jurisdiction.[2]

2. Personal Jurisdiction Over China Youth Corps.

If, as plaintiffs contend, CYC is a government instrumentality, then it is immune from suit under the FSIA. Plaintiffs have alleged in the alternative that CYC is a nonprofit foundation and corporation, and therefore not entitled to immunity under the Foreign Sovereign Immunities Act. Second Amended Complaint ¶ 11. Defendant CYC argues that this Court does not have jurisdiction over CYC because CYC does not have sufficient contacts with California necessary to satisfy California's long-arm statute and Constitutional due process. *See Hunt v. Erie Ins. Group*, 728 F.2d 1244, 1246. (9th Cir. 1984) (California's long-arm statute confers jurisdiction coextensive with that permitted by due process).

"Where a defendant challenges the sufficiency of personal jurisdiction, the plaintiff must bear the burden of establishing that the court does have jurisdiction." *Cubbage v. Merchant*, 744 F.2d 665, 667 (9th Cir. 1984), *cert. denied*, 470 U.S. 1005, 105 S. Ct. 1359 (1985). In the absence of an evidentiary hearing, however, the plaintiff need only make a prima facie showing of jurisdictional facts. *Data Disc*, 557 F.2d at 1285.

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[2] Because this Court dismisses plaintiffs' Second Amended Complaint based on subject matter jurisdiction, it does not address defendants' argument that plaintiffs' complaint against Taiwan and OCAC is time-barred.

Due process requires that the defendant have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945). A court may exercise either specific or general jurisdiction over a nonresident defendant. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 nn. 8-9; 104 S. Ct. 1868, 1872 nn. 8-9 (1984). Specific jurisdiction may be applied where the suit arises out of or relates to the defendant's contacts with the forum. *Id.* at n.8. General jurisdiction may apply in circumstances where the suit does not arise out of or is not related to the defendant's contacts with the forum, but the defendant's activities in the forum are substantial. *Id.* at 1873 & n.9.

A. General Jurisdiction.

If a nonresident defendant's activities within a state are "substantial" or "continuous and systematic," there are contacts sufficient to support general jurisdiction. *Data Disc*, 557 F.2d at 1287 (citing *Perkins v. Benguet Consol Mining Co.*, 342 U.S. 437, 446-47, 72 S. Ct. 413 (1952)). Here, however, the activities of CYC described by plaintiffs took place in Taiwan, and plaintiffs offer no evidence to suggest CYC has "substantial" or "continuous and systematic" contacts with California.

Defendants argue that plaintiffs cannot attribute TECRO's contacts with the United States to CYC. Although "[f]or purposes of personal jurisdiction, the actions of an agent are attributable to the principal," *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir, 1990), plaintiffs

present no facts here showing that TECRO is CYC's agent. Indeed, plaintiffs present no facts showing any direct relationship between CYC and TECRO at all. Defendants, on the other hand, present evidence that CYC conducts no activities in the United States, and that there is no agency relationship between CYC and TECRO. Amended Decl. of Weio-Pan, dated December 4, 1996, ¶¶ 3, 7-8. At most, plaintiffs' evidence suggests that OCAC may have supervised both CYC and TECRO with regard to the Tour, but that CYC and TECRO had no direct relationship with each other. Rather than offer specific facts to support personal jurisdiction over CYC, plaintiffs simply argue that CYC is a government instrumentality. *See* Opposition at 32-33. This, however, would bring CYC within the immunity conferred by the FSIA. Thus plaintiffs have not demonstrated a factual basis for general jurisdiction here.

B. Specific Jurisdiction.

Even without general jurisdiction over the defendant, this Court could have jurisdiction specific to the case here if the controversy were sufficiently related to or arose out of CYC's contacts with California. *Omeluk*, 52 F.3d at 270 (citing *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 414, 104 S. Ct. at 1872). The Ninth Circuit has set forth a three part test to determine whether specific jurisdiction may be applied to a defendant:

> (1) The nonresident defendant must do some act or consummate some transaction with the

> forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws.
>
> (2) The claim must be one which arises out of or results from the defendant's forum-related activities.
>
> (3) Exercise of jurisdiction must be reasonable.

Data Disc., 557 F.2d at 1287. If any of these three requirements are not met, "jurisdiction in the forum would deprive the defendant of due process of law," *Omeluk*, 52 F.3d at 270.

With regard to the first prong, plaintiffs have presented no evidence suggesting that CYC has purposely availed itself of the forum state. All of CYC's tour-related activities took place in Taiwan. For example, plaintiffs have alleged that CYC, under the supervision of OCAC, ran the day to day operations of the Tour. Second Amended Complaint ¶ 7. The Tour activities took place exclusively in Taiwan. Chen Decl. of July 28, 1998, ¶ 9. Although plaintiffs allege that collectively TECRO, OCAC and CYC engaged in a number of activities related to the Tour, Second Amended Complaint ¶ 8, they have identified no specific action by CYC by which CYC invoked the benefits and protections of California's laws. Therefore, plaintiffs fail to put forward sufficient facts to meet the first prong of the *Data Disc* test.

The third prong of the *Data Disc* test requires consideration of seven factors:

> (1) the extent of the defendant's purposeful interjection into the forum state's affairs;

(2) the burden on the defendant;

(3) conflict of law between the forum and defendant's home jurisdiction;

(4) the forum's interest in adjudicating the dispute;

(5) the most efficient judicial resolution of the dispute;

(6) the plaintiff's interest in convenient and effective relief;

(7) the existence of an alternative forum.

Roth v. Garcia Marquez, 942 F.2d 617, 623 (9th Cir. 1991). Although plaintiffs offer no evidence or arguments suggesting specific jurisdiction here, instead relying on their position that CYC is a government instrumentality, this Court will address these factors in light of the evidence before it.

The first factor is essentially a reconsideration of the first prong of the *Data Disc* test, which does not help the plaintiffs here. *Cf. Roth*, 942 F.2d at 623. Plaintiffs have not demonstrated CYC's contacts with the [sic] California.

With regard to the second factor, defendant CYC argues that the burden on it is great because CYC is a non-profit organization dedicated to cultural and educational pursuits in Taiwan. The Supreme Court has suggested that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight" in determining whether extending jurisdiction is reasonable. *Asahi Metal Ind. v. Super Ct. of Cal., Solano Cty.*, 480 U.S. 102, 114, 107 S. Ct. 1026, 1033 (1987). Particularly in light of CYC's negligible, if any,

contacts with California, this factor weighs in favor of defendant CYC.

Defendant CYC also argues that California has little interest in adjudicating this dispute, as plaintiffs are Illinois residents suing a Taiwanese corporation over an accident in Taiwan. The Supreme Court has held that where the plaintiff is not a resident of the forum state, that state has a diminished interest in adjudicating the dispute. *Asahi*, 480 U.S. at 114, 107 S. Ct. at 1033 ("Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished."). Therefore this factor weighs in favor of defendant CYC.

Defendant CYC argues that Taiwan is a more efficient forum for resolution of the dispute, as many of the witnesses to the accident are there, the location of the accident is there, and the Taiwan courts would have subpoena power over its citizens. *See Pacific Atlantic Trading Co. v. M/V Main Exp.*, 758 F.2d 1325, 1331 (9th Cir. 1985) ("The site where the injury occurred and where evidence is located usually will be the most efficient forum.") Plaintiffs offer no counter arguments or evidence on this point, but the Court notes that plaintiffs' administrative claim filed with defendants soon after the accident was denied and no relief was provided, and further that defendants argue here that the statute of limitations has expired in Taiwan. This factor appears at best to be neutral.

Defendant CYC does not address plaintiffs' interest in convenient and effective relief, perhaps because it realizes that this factor is not in its favor. Although arguably

the California forum is inconvenient to plaintiffs, who are Illinois residents, a Taiwanese forum would be even more so. In addition, it is unclear whether plaintiffs could now bring an action in Taiwan, as the statute of limitations there may have already run. Plaintiffs offer no evidence or arguments on this point, but nevertheless this factor weighs in their favor.

Finally, defendants argue that to exercise jurisdiction would conflict with the sovereignty of Taiwan, and that Taiwan has a substantial interest in adjudicating a legal action involving its own instrumentalities for conduct involving an accident that occurred within its borders. The Supreme Court in *Asahi* cautioned court to consider the interests of other nations in deciding whether to exercise jurisdiction. *Asahi*, 480 U.S. at 115, 107 S. Ct. at 1034. The Court advised lower courts to show "an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State." *Id.* Accordingly, this Court finds that the factors here weigh against finding jurisdiction over defendant CYC.[3]

3. Plaintiffs' Motion to Strike and For Sanctions.

Plaintiffs ask this Court to strike the declaration of Mr. Tsai based on his refusal to answer questions in his

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[3] Because the Court finds no jurisdiction over CYC here, it does not reach CYC's contentions regarding the statute of limitations or relation back, and need not consider the evidence offered regarding Taiwanese law.

deposition, and for sanctions. This Court has addressed defendants' motions to dismiss without relying on Mr. Tsai's declarations. However, in light if his refusal to testify, the motion to strike is GRANTED. As for sanctions, the Ninth Circuit specifically ruled that Mr. Tsai must make himself available for deposition, but could refuse to answer questions based on immunity. *Taiwan v. U.S. Dis. Ct. for the Northern District of California*, 128 F.3d at 719-20. The Ninth Circuit also set forth the remedy for Mr. Tsai's failure to answer questions – striking his declaration as a basis for defendants' motion to dismiss. *Id.* Accordingly, sanctions are inappropriate as a remedy here.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss for lack of subject matter jurisdiction is hereby GRANTED, Plaintiffs' motion for sanctions is DENIED.

IT IS SO ORDERED.

Dated: October 15, 1998

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TEI YAN SUN; YEH HWA SUN, Individually and as Personal Representatives of Peter Sun, deceased; PHILIPE SUN, Plaintiffs-Appellants v. TAIWAN; TAIPEI ECONOMIC, AND CULTURAL REPRESENTIVE OFFICE IN THE U.S.; CHINA YOUTH CORPS; OVERSEAS CHINESE AFFAIRS COMMISSION, Defendants-Appellees.	No. 98-17166 D.C. No. C94-2769-SI ORDER (Filed June 2, 2000)

Before: PREGERSON, NOONAN, and O'SCANNLAIN, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing. Judge Pregerson and Judge O'Scannlain have voted to deny the petition for rehearing en banc. Judge Noonan so recommends. The full court has been advised of the petition for rehearing en banc and no

active judge has requested a vote on whether to rehear the matter en banc. Fed.R.App. P.35.

The petition for rehearing and the petition for rehearing en banc are DENIED.